

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

U.S. DEPARTMENT OF AGRICULTURE,
1400 Independence Avenue SW
Washington, DC 20250

Defendant.

Case No. 19-cv-1201

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Agriculture under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Department of Agriculture (USDA) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). USDA has possession, custody, and control of the records American Oversight has requested.

STATEMENT OF FACTS

7. American Oversight submitted two FOIA requests to USDA—on November 1, 2018, and February 21, 2019, respectively—seeking records primarily relating to Secretary Sonny Perdue’s potential conflicts of interests, ethics disclosures and recusals, and communications with certain entities outside of USDA.

Business Interests FOIA Request

8. On November 1, 2018, American Oversight submitted a FOIA request to USDA requesting:

All communications (including emails, email attachments, calendar invitations/entries, written guidance or memoranda) by individuals in the Office of Ethics at USDA regarding Secretary Perdue’s business interests, potential conflicts of interest, and any final decisions surrounding his ethics disclosures and recusals.

Please search the records of anyone with an email address ending in @oe.usda.gov, including but not limited to:

- i. Stuart Bender, Director of the Office of Ethics and Designated Agency Ethics Official (Stuart.Bender@oe.usda.gov)
- ii. Andrew Tobin, Deputy Director of the Office of Ethics and Alternate Designated Agency Ethics Official (Andrew.Tobin@oe.usda.gov)
- iii. Mildred Benson, Office of Ethics Senior Advisor for Financial Disclosure Systems and Presidential Nominations (Mildred.Benson@oe.usda.gov)

Please provide all responsive records from January 18, 2017, through the date the search is conducted.

This request includes all messages on which any of the individuals specified above appears (whether in the to, from, cc, or bcc field), as well as all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

9. By electronic mail on November 8, 2018, USDA acknowledged receipt of the Business Interests FOIA Request. USDA assigned this request the tracking number 2018-DA-00841-F.

10. American Oversight has not received any further communications from USDA regarding this FOIA request.

External Communications FOIA Request

11. On February 21, 2019, American Oversight submitted a FOIA request to USDA requesting:

- 1) All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) with Senator David Perdue or any person who works for Senator Perdue, including any person using an email address ending in perdue.senate.gov.

Please produce responsive records of the following individuals and offices:

- a) All political appointees* in the Immediate Office of the Secretary, including Secretary Perdue

- b) All political appointees* in the Office of Congressional Relations
 - c) Farm Service Agency Georgia State Executive Director Talmadge Smith
 - d) USDA Rural Development Georgia State Director Joyce White
- 2) All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between or among (a) any political appointee* in the Immediate Office of the Secretary, including Secretary Perdue, and (b) any of the following individuals and entities or any person acting on their behalf:
- a) Jose “Pepe” Fanjul Jr.
 - b) Jose “Pepe” Fanjul Sr.
 - c) Alfonso “Alfie” Fanjul Jr.
 - d) Florida Crystals Corporation (including but not limited to any person using an email address ending in floridacrystals.com)
 - e) Fanjul Corp.
 - f) Becker & Poliakoff (including but not limited to any person using an email address ending in bplegal.com)
 - g) Smith & Boyette, including Van Boyette

Please produce all responsive records from January 20, 2017 through the date of search. Responsive records should include communications on which relevant custodians are copied (cc) or blind copied (bcc).

* “Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

12. By electronic mail on February 27, 2019, USDA acknowledged receipt of the External Communications FOIA Request. USDA assigned this request the tracking number 2019-DA-02446-F.

13. American Oversight has not received any further communications from USDA regarding this FOIA request.

Exhaustion of Administrative Remedies

14. As of the date of this Complaint, USDA has failed to (a) notify American Oversight of any determination regarding its FOIA requests, including the scope of any responsive records USDA intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

15. Through USDA's failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Searches for Responsive Records

16. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

17. American Oversight properly requested records within the possession, custody, and control of USDA.

18. USDA is an agency subject to FOIA, and it must therefore make reasonable efforts to search for requested records.

19. USDA has failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

20. USDA's failure to conduct adequate searches for responsive records violates FOIA and USDA regulations.

21. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

22. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

23. American Oversight properly requested records within the possession, custody, and control of USDA.

24. USDA is an agency subject to FOIA, and it must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

25. USDA is wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce non-exempt records responsive to its FOIA requests.

26. USDA is wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

27. USDA's failure to provide all non-exempt responsive records violates FOIA and USDA regulations.

28. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;

- (2) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: April 25, 2019

Respectfully submitted,
/s/ Hart W. Wood
Hart W. Wood
D.C. Bar No. 1034361

/s/ Elizabeth France
Elizabeth France
D.C. Bar No. 999851

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